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WM. R. STAN

No. [redacted] 114

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1926.

N. & G. TAYLOR COMPANY, INC., a Corporation
Petitioner,

vs.

JOHN A. ANDERSON and C. A. GUSTAFSON, doing business under the name of ANDERSON & GUSTAFSON, co-partners,
Respondents.

Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit. There heard on error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

OPPOSING BRIEF ON BEHALF OF RESPONDENTS.

HOBART P. YOUNG,
ATTORNEY FOR RESPONDENTS.

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OPPOSING BRIEF ON BEHALF OF RESPONDENTS.

Petitioner can maintain this suit in its own name as the assignee of the chose in action sued on, only by virtue of Section 18 of the Illinois Practice Act (Chapter 110, Cahill's R. S. 1923), but to state a cause of action under that Section it must allege in its declaration that it is the assignee of the chose in action and that it is the actual bona fide owner thereof and set forth how and when it acquired title.

The Illinois Supreme Court, in interpreting this act, has held that a declaration in a suit under this act does not state a cause of action unless it contains these allegations.

In *Allis Chalmers Mfg. Co. v. City of Chicago*, 297 Ill. 444, the Court said:

> "The allegations in regard to any assignment by the Allis Chalmers Company to the plaintiff do not appear in the original declaration, and no attempt to comply with this section of the Practice Act was made until the

filing of the amended declaration on December 2, 1919, six years after the expiration of the period of limitation for bringing suits against the city for damages by reason of the vacation of the street. A declaration in a suit by an assignee of a chose in action does not state a cause of action in favor of the plaintiff unless it contains the allegations required by section 18, showing the assignment of the chose in action, the actual ownership thereof by him and setting forth how and when he acquired title. A declaration which fails to allege a fact without whose existence the plaintiff is not entitled to recover does not state a cause of action. (*Walters* v. *City of Ottawa*, 240 Ill. 259; *Prouty* v. *City of Chicago*, 250 *id.* 222.) The plea of the Statute of Limitations therefore presented a complete bar to the plaintiff's action. The amendment to the declaration was not a substitution of a proper party plaintiff for one in whose name the action had been improperly begun, but was the statement of a different cause of action in favor of the plaintiff by whom the suit was originally begun, based upon a different and contradictory state of facts."

The case at bar is identical with the case of *Allis Chalmers Mfg. Co.* v. *Chicago*, *supra*. Petitioner's amended declaration was not a substitution of a proper party plaintiff for one in whose name the action had been improperly begun, because the petitioner was the plaintiff all the way through, but was the statement of a different cause of action in favor of the petitioner by whom the suit was originally begun based upon a state of facts, which were alleged for the first time in the amended declaration.

In *Gallagher* v. *Schmidt*, 313 Ill. 40, (citing *Allis Chalmers Mfg. Co.* v. *Chicago*, 297 Ill. 444), the Court held that a suit on a chose in action in the name of the original owner and a suit by an assignee thereof in his own name under Section 18 of the Illinois Practice Act are two separate and distinct suits, and that in a suit originally brought on a chose in action an amended declaration alleging the assignment thereof to the plaintiff sets forth a new cause of action. If the period of the Statute of Limitations has run, the suit is barred.

In the case at bar, the petitioner filed its amended declaration on May 14, 1924, after the Statute of Limitations had run. In its original declaration, filed March 7, 1918, petitioner alleged a contract between itself and the respondents, dated November 1, 1916, calling for the delivery of a large quantity of oil from the respondents to the petitioner, and charged a breach thereof, but the fact was that the petitioner had never entered into any such contract because it did not come into existence until February 1, 1917. Finding that it could not prove its case as charged, petitioner obtained leave to amend its declaration, and declared, as assignee of the contract, setting forth that it was the actual owner thereof and how and when it acquired title thereto, asserting its right to maintain the suit in its own name by virtue of Section 18 of the Illinois Practice Act. The Court allowed the amendment, and, of course, there was no error in this because the Court had the power to allow the amendment under Section 954 of the United States Revised Statutes. Nevertheless, the amended declaration stated a new cause of action, and the period in which to bring the suit having expired it was barred by the Statute of Limitations, if the respondents availed themselves of the right to plead the statute, as they did, which was an affirmative defense.

Whatever may be said about any injustice resulting from sustaining such a plea is beside the point. It may be said that an injustice results every time a cause of action is terminated by a plea of Statute of Limitations. Nevertheless, the petitioner had six years in which to bring its suit under Section 18 of the Illinois Practice Act. When it elected to avail itself of the right to sue under that section it took the section "cum onere."

There is no conflict between the decision of the Circuit Court of Appeals in this case and the decision of any other Circuit Court of Appeals or any other Federal Court on this question, nor is there any conflict in the decisions of the

Illinois Supreme Court in interpreting Section 18 of the Practice Act. The decisions of the Illinois Supreme Court are very plain and in entire harmony.

The decisions of the Supreme Court of a state construing its practice acts are binding on the federal courts.

On such a question of practice as is presented here, the Federal Courts will follow the decisions of the Supreme Court of the state where the suit is brought. (*Atlantic & P. R. Co. v. Hopkins*, 94 U. S. 11.) *Elmendorf v. Taylor*, 10 Wheat. 152, 158; *Memphis St. Railway v. Moore*, 243 U. S. 299; *Old Colony Trust Co. v. Omaha*, 230 U. S. 100, 116; *Chicago v. Obermayer Co.*, 268 Fed. 237; *Nederland Life Ins. Co., Ltd. v. Hall*, 84 Fed. 278, C. C. A. (7th Cir.).

In the last case cited (*Nederland Life Ins. Co., Ltd. v. Hall*, 84 Fed. 278), which was a decision by the Circuit Court of Appeals for the Seventh Circuit, the Court said:

> "As the practice in the courts of the United States must conform as near as may be to that in the courts of the state (R. S. Section 914), these decisions construing the practice acts of the state are binding upon the courts of the United States."

Cases relied upon by petitioner are not cases of pleading or practice, but of federal jurisdiction.

The cases upon which the petitioner most strongly relies are not cases where a question of practice or pleading was involved, but questions of federal jurisdiction. The *Wolf case* (*M. K. & T. Ry. v. Wolf*, 226 U. S. 570) was simply a case where a mother as sole beneficiary, and entitled to the whole of the recovery, brought suit under a Kansas statute to recover for the death of her son, and by amendment joined herself as administratrix so as to bring the

case under the federal statute; namely, the Federal Employers' Liability Act. The Court said, at page 574:

> "It is true the original petition asserted a right of action under the laws of Kansas without making reference to the act of Congress, but the court was presumed to be cognizant of the enactment of the Employers' Liability Act and to know that with respect to the responsibility of interstate carriers by railroads to their employes injured in such commerce after its enactment it had the effect of superseding state laws upon the subject."

In the *McDonald case* (*McDonald* v. *State of Nebraska*, 101 Fed. 171) the Court permitted the State of Nebraska to be substituted as plaintiff in place of the treasurer of the state. The Court held that there was no change of the real party plaintiff, and that the cause of action was not changed in the slightest degree. No question of state practice was involved.

In the case at bar, independent of the Illinois statute, no suit could be maintained in a court of law other than by H. N. Taylor and W. W. Justice, Jr., comprising the co-partnership. There was no suit ever commenced in the partnership name nor in its name for the use and benefit of another. After the statute had run, the petitioner, being the corporation to which the contract had been assigned, filed its amended declaration declaring as assignee under Section 18 of the Illinois Practice Act. The Supreme Court of Illinois has held that this stated a new cause of action. It has never held otherwise, nor has any Federal Court ever held differently. No lack of harmony would result if the Supreme Court of another state should happen to construe a similar section of its practice act differently, and the Federal Court sitting in that state should follow the state court. The contention of the petitioner that the decision of the Illinois Supreme Court interpreting and construing Section 18 of the

Illinois Practice Act is not a matter of state practice or pleading, but the pronouncement of a general rule of law cannot be sustained. It is purely a question of pleading and practice, and the decisions of the Supreme Court of Illinois are binding on the Federal Courts.

There can be no doubt that if the question presented here was before the Illinois Supreme Court that Court would sustain the plea of the Statute of Limitations just as the United States District Court did and as the United States Circuit Court of Appeals for the Seventh Circuit did. Judge Evans in his dissenting opinion asked the question, "Why should this Court adopt the holding of the *Allis-Chalmers case?*" Our answer to that is that this Court has uniformly held that the Federal Courts will follow the decisions of the Supreme Court of a state construing its practice acts. *Atlantic & P. R. Co.* v. *Hopkins*, 94 U. S. 11; *Nederland Life Ins. Co., Ltd.* v. *Hall*, 84 Fed. 278 (C. C. A.); *Elmendorf* v. *Taylor*, 10 Wheat. 152; *Memphis Street Ry.* v. *Moore*, 243 U. S. 299; *Old Colony Trust Co.* v. *Omaha*, 230 U. S. 100; *Chicago* v. *Obermayer Co.*, 268 Fed. 237. See 914 Revised Statutes. There is no confusion about these decisions, nor is there any confusion as to the interpretation of Section 18 of the Illinois Practice Act by the Illinois Supreme Court. *Allis-Chalmers Mfg. Co.* v. *Chicago*, 297 Ill. 444; *Gallagher* v. *Schmidt*, 313 Ill. 40. Therefore, we contend that the petition for a writ of certiorari should be denied.

Respectfully submitted,

Horace P. Young,
Attorney for Respondents.

Supreme Court, U. S.
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Defendants in Error.

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BRIEF FOR DEFENDANTS IN ERROR.

HOBART P. YOUNG,
ATTORNEY FOR DEFENDANTS IN ERROR.

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BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

The facts in this case, as far as this appeal is concerned, are undisputed. However, counsel for plaintiff in error in their brief (p. 3) say that inasmuch as the trial Judge directed a verdict for the defendants "the defendants' breach of contract must be regarded as wholly unjustifiable and as attributable to their desire to reap the large profits available by the sale of plaintiff's oil to others at enhanced prices for delivery at nearby points for which tank cars were more readily available."

The contract was made during the World War, and the defendants anticipating that there might be some difficulty in getting tank cars in which to ship the oil inserted a special clause in the contract stating that their obligation to make deliveries was subject to their ability to secure tank cars for the shipment of the oil. (Rec. 37.) On account of war conditions and because the railroads placed embargoes

on shipments and would not permit tank cars to be loaded with oil for points east of the Indiana Ohio state line, the defendants were unable to ship the full amount of oil called for by the contract. While it is true that the full amount called for was never shipped, yet the defendants claim that they were excused under the contract and they filed appropriate pleas setting up their defense on the merits.

However, the merits of the case are not here involved and the question presented is the correctness of the ruling of the trial Court in sustaining the plea of the Statute of Limitations.

When was the contract breached?

Counsel for plaintiff in error seem to think that they can get some advantage for their legal position by contending that there was no "final breach" until March, 1917. The point seems to be that inasmuch as the plaintiff corporation did not come into existence until February 1, 1917, that they are in a better position to argue that the corporation "stepped into the shoes of the partnership" if there had been no breach of the contract while it was being performed between the partnership with whom it was made and the defendants in error. This point has no merit whatever as a matter of law, but the fact is that the plaintiff in error in both its original declaration and in its amended declaration alleges breaches of the contract during the months of November and December, 1916, and seeks to recover damages for failure to ship the full quantity of oil during those months. The amended declaration states "yet the said defendants did not nor would they within the time aforesaid either prior to February 1, 1917, to N. & G. Taylor Company, co-partners or afterwards to N. & G. Taylor Company, Inc. deliver the said oil * * *" (Rec. 36).

Moreover in the affidavit attached to the amended declaration, which under Section 18 of the Illinois Practice Act is

necessary to be filed with the declaration, the plaintiff in error swore that among the assets taken over on the first of February, 1917, by the corporation from the partnership there was included "a right of action against Anderson & Gustafson (defendants in error) for breach of contract from the first of November, 1916, or such time as the contract went into force to the 31st day of January, 1917." (Rec. 39.)

Furthermore, the Circuit Court of Appeals in its opinion in this cause found that defendants in error had breached the contract before the plaintiff corporation was organized. Mr. Justice Page, who wrote the opinion of the Court, said:

> "After defendants had defaulted thereon the co-partnership on February 1, 1917, sold all of its assets, including its rights under the contract, to appellant, called plaintiff, and plaintiff brought suit thereon in the Northern District of Illinois." (14 Fed. Rep. 2d Series, 353.)

and Mr. Justice Evans, in his dissenting opinion, on page 355, said:

> "When the corporation copartnership agreement above referred to was made (January, 1917) defendant had breached its contract, and thereafter continued to breach its agreement."

Thus it appears that what the plaintiff corporation took over from the partnership was a cause of action which *then existed* in favor of the partnership and against the defendants in error for damages for breach of contract during the months of November and December, 1916. In fact, the affidavit attached to the amended declaration limits the cause of action which was assigned to the corporation on February 1, 1917, to damages which were charged to have accrued up to that date. Counsel for plaintiff in error in their brief (p. 4) say that "although defendants fell behind in their deliveries from the beginning, the *actual legal breach* of contract by them did not occur until March, 1917." As we have pointed

out there is no basis for this attempted distinction between "actual" breach, and "final" breach. What happened in March, 1917, was merely that the corporation notified the defendants in error that it had terminated the contract because of the poor performance in the matter of deliveries.

The present cause of action did not accrue to the plaintiff corporation.

Counsel in their brief say (p. 14):

> "This is not a case (like the Illinois decisions relied on by the other side in the Court below) where one party to a contract, after a breach by the other, has assigned his completed cause of action to a distinct third party."

We contend that the present is just that kind of a case. The contract was between the co-partnership, N. & G. Taylor Co., and the defendants in error, and the claim for damages for the alleged breach during the months of November and December, 1916, (as well as the further responsibility under the contract) was assigned to the plaintiff corporation, which was a distinct third party. It is ridiculous to urge that the new corporation was merely a continuation of the old partnership. It was a distinct and separate entity and came into existence on February 1, 1917.

Counsel in their brief, say further:

> "It was not until March 20, 1917, therefore, that this present cause of action accrued, and it then accrued to the corporation, which had taken over the business of the partnership almost two months before."

What happened on March 20, 1917 was that the plaintiff corporation wrote a letter to the defendants in error, notifying them not to ship any more oil. The reason assigned was that

> "your performance in delivering oil has been so far below anything that could be called reasonable, that we

> have been convinced that there was no prospect of receiving from you any considerable proportion of your contract supply during the present spring and in view of our urgent need for fuel oil for our works we have therefore taken steps to secure a supply from other sources, although at an advanced rate."

The letter stated further, however, that

> "of course you (meaning defendants in error) will understand that our action in this regard was not taken in any way as relieving you from your obligations under the contract, or as an acknowledgment by us of the propriety of your excuse for your failure to live up to the terms of the contract." (R. 58.)

This notice, or letter, sent on March 20, 1917, did not *create* any cause of action, nor did it fix the date when any cause of action accrued. The cause of action accrued to the partnership when the contract was breached by the defendants in error.

Not only did plaintiff in error claim damages for failure to make the full shipment during the months of November and December, 1916, but, on the contrary, they actually undertook at the trial to prove up the shortage of deliveries during those months. (R. 63, 75.) The quantity called for by the contract was 150,000 gallons a month and on November 17, 1916, N. & G. Taylor Company, the co-partnership, wired defendants in error to rush delivery of the full November quota. (R. 72.) Defendants in error replied on the same day, stating

> "On account of the tank car situation we are very much behind in our fuel shipments and up to date have not been able to divert any cars to you to apply on your November orders. We hope to be able to divert a part of the cars already ordered the early part of next week, but it does not appear at all likely that we can divert any before that time." (R. 73.)

If the defendants in error were without legal excuse for not shipping the November installment of 150,000 gallons and

the December installment of the same amount, then they became liable to the N. & G. Taylor Co., a co-partnership, for damages and that cause of action accrued in the months of November and December, 1916, and in the affidavit attached to the plaintiff's amended declaration that claim or cause of action is specifically stated to have been assigned to the plaintiff corporation on February 1, 1917. We repeat that it is absurd to urge that the present cause of action accrued directly to the plaintiff corporation.

Counsel also say in their brief (p. 15):

> "While defendants fell behind in their agreed deliveries prior to the reorganization, this delay was apparently acquiesced in by plaintiffs until March 20, 1917, when, plaintiffs refused further to condone defendants' scanty deliveries and wrote defendants that in view of defendants' failure to keep up the agreed schedule of deliveries, plaintiffs would buy this oil elsewhere and hold defendants for the difference in price."

If the plaintiff in error acquiesced in the failure to make deliveries until March 20, 1927, then only such damages as accrued subsequent to that date and until the end of the term of the contract, which was June 30, 1917, could be recovered. If no claim accrued until March 20, 1917, then no claim existed which N. & G. Taylor Co., the co-partnership, could have assigned to the corporation on February 1, 1917.

The assertion which counsel for plaintiff in error put it their brief (p. 16) that "The two partners merely changed the form of their organization" is not worthy of reply. It has been repeatedly held that a corporation succeeding to a partnership business is a new and distinct entity.

Delay in case being reached for trial.

There is one more point, which we wish to mention before proceeding to the citation of authorities and our argument on the real question involved here, and that is the effort on

the part of counsel for plaintiff in error to place the responsibility on the defendants in error for the delay in this case being reached for trial, which gave the defendants in error their opportunity to plead the Statute of Limitations. Counsel in their brief say (p. 5): "Owing to a congested docket and to a postponement requested by defendants, the trial was not held until May 12, 1924, more than six years after the cause of action accrued." It is true that the docket was congested, but whatever postponements there were at the instance of counsel on either side, were made by agreement, and counsel for plaintiff in error requested as many continuances as counsel for defendants in error.

ARGUMENT.

Summary.

We assert the following propositions of law:

I.

(A) In a suit brought under Section 18 of the Illinois Practice Act by the assignee of a non-negotiable chose in action in his own name the pleading must allege that he is the actual bona fide owner thereof and set forth how and when he acquired title.

Cahill Illinois Revised Statutes, 1927, Chap. 110, Sec. 18, p. 1944.

(B) Unless such a declaration contains the allegations required by Section 18, showing the assignment of the chose in action, the actual ownership thereof by the plaintiff, and setting forth how and when he acquired title, it does not state a cause of action.

Allis-Chalmers Mfg. Co. v. *Chicago*, 297 Ill. 444.

(C) A cause of action stated in an amendment to such a declaration alleging those facts, filed after the Statute of Limitations has run, is barred.

Gallagher v. *Schmidt*, 313 Ill. 40.

II.

Under the Federal cases the amended declaration stated a new cause of action.

III.

(A) The contract was not assignable without the consent of the defendants in error.

(B) The claim for damages for breach of the contract up to the time when the partnership went out of business was assignable. This is the claim which is specifically referred to in the affidavit attached to the amended declaration.

I.

(A) Effect of Section 18 of Illinois Practice Act and the Statute of Limitations as construed by the Supreme Court of Illinois.

Section 18, Chapt. 110, Illinois Practice Act, so far as material to the present case, is as follows:

> "The assignee and equitable and *bona fide* owner of any chose in action not negotiable, heretofore, or hereafter assigned, may sue thereon in his own name, and he shall in his pleading on oath, or by his affidavit, where pleading is not required, allege that he is the actual *bona fide* owner thereof, and set forth how and when he acquired title, * * *."
>
> Cahill's Illinois Revised Statutes, 1927, p. 1944.

In its original declaration, filed March 7, 1918, plaintiff in error alleged a contract between itself and defendants in error, dated November 1, 1916, calling for the delivery of a large quantity of oil from defendants and charged a breach thereof. The fact was, however, that plaintiff in error had never entered into any such contract because it did not come into existence until February 1, 1917. The contract referred to was between a co-partnership doing business as N. & G. Taylor Co. and the defendants in error.

Plaintiff in error, finding that it could not prove that defendants in error had ever contracted with it, asked leave to amend its declaration. This was granted, and properly so, both under the broad power of Federal Courts to grant amendments under Section 954 of the United States Revised Statutes and also under the Illinois Statutes on Amendments. (Ill. Rev. Stats., 1927, Chapt. 7, Sec. 1.) In the amended declaration, plaintiff in error declared as assignee

of the contract, setting forth that it was the actual owner thereof, and how and when it acquired title thereto, asserting its right to maintain the suit in its own name by virtue of Section 18 of the Illinois Practice Act.

Under the Illinois decisions the plaintiff in error stated a new cause of action in the amendment.

Allis-Chalmers Mfg. Co. v. *City of Chicago*, 297 Ill. 444.

Gallagher v. *Schmidt*, 313 Ill. 40.

After the amendment was made the defendants in error filed a plea of the Statute of Limitations which was sustained by the trial Court and later by the Circuit Court of Appeals.

That decision is correct under the cases of *Allis-Chalmers Mfg. Co.* v. *City of Chicago*, 297 Ill. 444, and *Gallagher* v. *Schmidt*, 313 Ill. 40.

(B) A declaration by the owner of a non-negotiable chose in action which fails to allege compliance with Section 18 states no cause of action.

In *Allis-Chalmers Mfg. Co.* v. *City of Chicago*, 297 Ill. 444, 450, the Court said:

> "The allegations in regard to any assignment by the Allis-Chalmers Company to the plaintiff do not appear in the original declaration, and no attempt to comply with this section of the Practice act was made until the filing of the amended declaration on December 2, 1919, six years after the expiration of the period of limitation for bringing suits against the city for damages by reason of the vacation of the street. A declaration in a suit by an assignee of a chose in action does not state a cause of action in favor of the plaintiff unless it contains the allegations required by section 18, showing the assignment of the chose in action, the actual ownership thereof by him and setting forth how and when he acquired title.

A declaration which fails to allege a fact without whose existence the plaintiff is not entitled to recover does not state a cause of action. (*Walters* v. *City of Ottawa*, 240 Ill. 259; *Prouty* v. *City of Chicago*, 250 *id.* 222.) The plea of the Statute of Limitations therefore presented a complete bar to the plaintiff's action. The amendment to the declaration was not a substitution of a proper party plaintiff for one in whose name the action had been improperly begun, but was the statement of a different cause of action in favor of the plaintiff by whom the suit was originally begun, based upon a different and contradictory state of facts."

(C) A cause of action stated in an amendment complying with Section 18 is barred if the Statute of Limitations has then run.

In the case of *Gallagher* v. *Schmidt*, 313 Ill. 40, the Court refers to the case of *Allis-Chalmers Mfg. Co.* v. *City of Chicago*, *supra*, and holds that a suit on a chose in action and a suit by an assignee in his own name on the same chose in action under Section 18 of the Illinois Practice Act are two separate and distinct suits, and that in a suit originally brought on the chose in action an amended declaration alleging the assignment thereof sets forth a new cause of action. If the Statute of Limitations has then run, it is a bar to the new cause of action stated in the amended declaration.

In fact, counsel for plaintiff in error concede that, if this case were before the Supreme Court of Illinois the judgment would be affirmed, but they contend that the Federal Courts should adopt a different rule.

II.

(A) Under the Federal cases the amended declaration stated a new cause of action.

The dissenting opinion of Judge Evans and the argument of plaintiff in error proceed upon the theory that the Illinois decisions above cited are not conclusive as to whether a new cause of action is stated by an amendment made in order to conform to Section 18 of the Practice Act. The argument is based mainly upon *Swift* v. *Tyson*, 41 U. S. 1, 18. The point seems to be that the decisions holding that the Statute of Limitations is applicable if the amendment occurs after the statutory period has expired are merely *inferences* from Section 18, and that the Federal Courts are not bound by these inferences. The question is twofold: *first*, whether the Illinois decisions are merely inferences from the statute, rather than a construction of it, by which the Federal Courts are concededly bound; and, *second*, conceding for the purposes of the argument that the Illinois decisions are but inferences from the statute, whether their persuasiveness and determinative value as precedents is lessened thereby.

(B) Illinois decisions are not mere inferences from Section 18 of the Practice Act.

It will be noted that Section 18 provides that the assignee of any non-negotiable chose in action may sue thereon in his own name (which could not be done in Illinois before the enactment of this statute). It then provides that the assignee shall in his pleading on oath allege: (1) that he is the actual *bona fide* owner thereof and (2) how and when he acquired title.

The Illinois decisions are to the effect (1) that no assignee can sue in his own name without compliance with this section

and (2) where he does so for the first time in his amended declaration he may be barred by the Statute of Limitations as he has then for the first time stated a cause of action *under this Act.*

It should be particularly noted that, when this suit was instituted, the plaintiff in error was in no way obliged to bring itself within this statute *and did not make any attempt to do so.* Suit could have been brought (1) in the name of the partnership, (2) in the name of the partnership for the use of the corporation, or (3) in the name of the corporation *provided it comply* with Section 18. Instead of choosing any of these alternatives, the corporation chose to sue in its own name, without making any attempt to comply with the Act, and just as if it had originally made the contract with the defendants in error.

There was no attempt, not even a defective attempt, to state a cause of action under the statute. Had the plaintiff in error's declaration stated that it was the actual *bona fide* owner of the chose in action, but had omitted to state how and when it obtained title, there would have been a defective statement of the cause of action. This defect would have been fatal under the Illinois decisions, but assuming that under the Federal decisions it would be held that this was merely a defective statement of a cause of action and could be cured by amendment without being barred by the Statute of Limitations, yet we contend that such a holding would not help the plaintiff in error here, because that question is not in this case. The plaintiff in error did not attempt to state a cause of action under Section 18 of the Illinois Practice Act, and therefore its original declaration cannot be held to be a defective statement of a cause under said section. The original declaration stated a good cause of action and it was properly set forth, and the plaintiff in error could have recovered if the facts alleged were true, but they were not.

and plaintiff in error abandoned *that* cause of action, and set up a *new* cause of action in its amended declaration.

From this illustration it readily appears that decisions to the effect (1) that when an assignee sues in his own name without making any attempt to state a cause of action under the statute; (2) that an amendment complying with Section 18 for the first time states a cause of action and that it is a new cause of action and (3) that the new cause of action is barred if the statutory period has elapsed represent the inevitable effect and operation of the Act under discussion and are in no sense mere inferences from that Act.

(C) Even considered as inferences the decisions of state courts based upon local questions are binding upon Federal Courts.

The recent case of *Irving National Bank* v. *Law*, 9 F. (2d) 536, 10 F. (2d) 721, C. C. A., 2d Cir., is directly in point.

The Court said, 9 F. (2d) 536, 537:

> "The question at bar is of the meaning of Section 13 of the Civil Practice Act of New York, which, so far as relevant, provides that when a cause of action, as in the case at bar, arises outside New York, 'an action cannot be brought * * * after the expiration of the time limited by the laws of a state or country where the cause of action arose.' Two views are possible of this provision, one, that the law exposed persons sued in New York to no longer a period of limitation than did the law of the place where the cause of action arose; the other, that no one should be sued in New York if at the time he could not be sued in the state where the cause of action arose."

An Appellate Division case had ruled that the second was the proper view, but, after considering the question, the Circuit Court of Appeals for the Second Circuit decided that a construction of a statute by the Appellate Division was not of sufficient authority to preclude it from applying its own

construction of the statute; whereupon, after criticism of the Appellate Division precedent, the Circuit Court of Appeals decided that the first was the proper view.

Upon the rehearing in the Circuit Court of Appeals the plaintiff called attention to two decisions of the Court of Appeals of New York, which neither party had cited at the first argument, and both of which tacitly assumed that the second view, that which the Circuit Court of Appeals had previously declined to follow, was the proper one. The Court said as to those decisions (10 F. (2d) 721, 722):

> "• • • they seem to us conclusively to construe section 13 of the New York Civil Practice Act in the sense that the plaintiff desires."

After stating the two New York Court of Appeals cases the Circuit Court of Appeals said:

> "Although the construction of section 13 was assumed *sub silentio* in both opinions of the Court of Appeals, in spite of Judge Cardozo's dissent in the first, the ruling is authoritative upon us, regardless of our own opinion to the contrary. In obedience to it we therefore now decide that the action at bar was begun in season."

The fact that the Circuit Court of Appeals thought it necessary to reverse its own previous decision forcibly illustrates the reluctance of Federal Courts to depart from the decisions of a state Court of last resort applying its Statute of Limitations, *even when the statute is not expressly construed.*

The case at bar is even stronger for the application of the Illinois decisions than *Irving National Bank* v. *Law* is for the application of the New York decisions. The Illinois Supreme Court has not left the application of Section 18 of the Practice Act to be deduced from its decision, but in *Allis-Chalmers Mfg. Co.* v. *Chicago*, 297 Ill. 444, 450, it has unequivocally stated just what that construction is:

> "The allegations in regard to any assignment by the Allis-Chalmers Company to the plaintiff do not appear

in the original declaration, and no attempt to comply with this section of the Practice Act was made until the filing of the amended declaration on December 2, 1919, six years after the expiration of the period of limitation for bringing suits against the city for damages by reason of the vacation of the street. A declaration in a suit by an assignee of a chose in action does not state a cause of action in favor of the plaintiff unless it contains the allegations required by section 18, showing the assignment of the chose in action, the actual ownership thereof by him and setting forth how and when he acquired title. A declaration which fails to allege a fact without whose existence the plaintiff is not entitled to recover does not state a cause of action. (*Walters* v. *City of Ottawa*, 240 Ill. 259; *Prouty* v. *City of Chicago*, 250 *id.* 222.) The plea of the Statute of Limitations therefore presented a complete bar to the plaintiff's action."

In view of plaintiff in error's remark on page 18 of its brief that "the practice of the law is no longer a game between opposing lawyers" it may be observed that this case was brought on behalf of the plaintiff by Illinois lawyers of many years' experience. Presumably these gentlemen are as familiar with the rules of the game as played in Illinois as the defendants' attorneys and, if they desire to bring suit in Illinois or based on an Illinois statute they must proceed in accordance with the rules laid down by the Supreme Court of Illinois.

(D) Cases cited by plaintiff in error distinguishable.

In his dissenting opinion Judge Evans argues that, under the Federal decisions, no new cause of action was stated by the amended declaration. The first case cited is *N. Y. Cent. R. R.* v. *Kinney*, 260 U. S. 340. He quotes:

"The amendment 'merely expanded or amplified what was alleged in support of the cause of action already asserted and was not affected by the intervening lapse of time.'"

As applied to the present case, we believe that this overlooks the fact that there was no cause of action in favor of the corporation already asserted under the Illinois statute and, consequently, there was nothing to be expanded or amplified. If the plaintiff had even defectively stated a cause of action under Section 18, for instance, if it had stated, that it was the actual bona fide owner of the chose in action, but omitted to state how and when it acquired title, there would be at most a defective cause of action stated which might later have been expanded and amplified by the addition of the second essential allegation, to wit: how and when he acquired title. The first allegation alone would be held to state no cause of action at all in the Illinois, courts, but at least that much is required to state even a defective cause of action in the Federal courts.

Great reliance is also placed upon *M. K. & T. Ry.* v. *Wulf*, 226 U. S. 570. In that case the plaintiff brought her action in her individual capacity as mother of the deceased, when she should have brought it in her capacity as his administratrix. She was the sole heir and beneficiary of his estate. There had been no administration upon his estate at the time of the filing of the original petition, and it would have been impossible for her to have proceeded as administratrix at that time. After the two years Statute of Limitations had run she amended her petition to proceed as administratrix. This Court held that the amended petition did not state a new cause of action, because it stated no different state of facts as the cause of action and therefore related back to the beginning of the suit.

In that case the right of action was in the same person, the mother of the deceased, whether she sued in her individual or her representative capacity. In the case at bar the right of action was in the partnership, a totally different entity from the corporation which attempted to recover damages upon a contract to which it had never been a party.

There was here no case of the same entity suing originally in its individual capacity and then amending to sue in a representative capacity. The corporation sued in its own right in the first instance and the corporation remained the plaintiff throughout. Only after the Statute of Limitations had expired against the partnership, the owner of the cause of action, did the corporation make any showing that it had a right to recover in its corporate capacity, as assignee of the original owner.

The case at bar is more like *Union Pacific Ry. Co.* v. *Wyler*, 158 U. S. 285. The majority opinion of the Circuit Court of Appeals in the case at bar points on the distinction, that in the *Wyler case* the plaintiff, by amendment, abandoned the common law charge and rested the cause of action upon a statute. This Court in the *Wyler case* held that this amendment introduced a substantially new cause of action to which the bar of the Statute of Limitations applied.

Judge Page's opinion concludes on this subject:

> "We are of opinion that the difference between the *Wyler case* and the *Wulf case*, is one of the material differences between the *Wulf case* and the case at bar."

In the case at bar the plaintiff had no right whatever to recover at common law. Whatever right it had is necessarily based upon Section 18, permitting the assignment of the cause of action. The plaintiff in error here abandoned its attempt to recover upon any common law theory and sought to bring the case within the statute. The situation is the same as in the *Wyler case*.

As Mr. Justice Alschuler said in his separate opinion, (14 Fed. Rep., 2 Series, 355):

> "The amendment to the declaration was not a substitution of a proper party plaintiff for one in whose name the action had been improperly begun, but was the statement of a different cause of action in favor of the plaintiff by whom the suit was originally begun, based upon a

> different and contradictory state of facts." *Allis-Chalmers Mfg. Co.* v. *City of Chicago*, 297 Ill. 444, 130 N. E. 736, cited in *Gallagher* v. *Schmidt, et al.*, 313 Ill. 40, 144 N. E. 319.

The case of *Willits & Patterson* v. *Texas Refining Company*, 2 Fed. (2d Series) 547, cited by counsel, went up to the Court of Appeals from the District Court of the United States for the Northern District of Texas. The decision was based on *Mann* v. *Mitchell*, 241 S. W. 715 (decided by the Texas Court of Civil Appeals). The suit was brought on a promissory note given by the defendant in payment of a stock subscription. The original declaration described the note as payable to the Commonwealth Bonding & Casualty Insurance Company, for which company the plaintiff was receiver. In the amended petition, the note was described as payable to the Commonwealth Organization Company and later transferred and endorsed to the Commonwealth Bonding & Casualty Insurance Company. The Court held that the original and amended petitions set forth the same cause of action, and that the amendment simply corrected a misdescription of the note sued on. The cause of action was negotiable, and, as the Court said in the case of *Willits & Patterson* v. *Texas Refining Co., supra*, page 549:

> "• • • The only effect of the amendment in the present case was to permit the introduction of evidence, which, otherwise might have been objectionable under the petition as it stood. Like the original, it still asserts that the claim is the property of the corporation and that it grows out of the same contracts and circumstances which were alleged in the original petition. In other words, the claim, or cause of action, is identical."

In the case at bar, the chose in action was non-negotiable, and the plaintiff could maintain suit in its own name only by virtue of Section 18 of the Illinois Practice Act, and then it was required to aver that it was the actual *bona fide* holder,

and how and when it got title. Such facts were necessary to state a cause of action in its own name.

The case of *Johnson & Co.* v. *Staenglen & Muller,* 85 Fed. 603, cited by counsel in their brief, is not in point. In that case, the agreement declared on in the original suit was one that had been made originally between Johnson & Co. and Staenglen & Muller, and in the reinstated case the agreement declared on was one made originally between Johnson & Co. and G. E. Staenglen and assumed by Staenglen & Muller with the assent and approval of Johnson & Co. The Court found that after the contract was made, Muller became a partner of Staenglen, and notice was given to Johnson & Co., and thereafter all business was done between Johnson & Co. and Staenglen & Muller. Goods were invoiced to Staenglen & Muller and drafts drawn on Staenglen & Muller, which were paid by that firm. The Court held that these dealings between the parties, after knowledge of the succession of Staenglen & Muller to the business of G. E. Staenglen, gave the agreement the same force and effect as if it had been made between Johnson & Co. and Staenglen & Muller.

In the case of *Quaker City Cab Co.* v. *Fixter,* 4 F. (2d) 327, cited by plaintiff in error, it appeared in the statement of claim that the claimant was the widow of the deceased as well as administratrix. The state statute required her to sue as widow. The amendment made in that case consisted in striking out the words "administratrix of the estate of Walter Fixter, deceased" from the first and last paragraphs of the statement of claim. It was held that this was not a statement of a new cause of action and was not, therefore, barred by the Statute of Limitations. It seems to us that this is a good example of the statement of a merely defective cause of action, which might be cured by amendment under the Federal cases. The suit was brought by the right party, but as administratrix instead of as widow. Her statement

of claim showed that she was the right party. In the case at bar the suit was brought by the wrong party and its declaration not only failed to show that it was the right party under the wrong name, as in *Quaker City Cab Co.* v. *Fixter*, but the declaration contained nothing to indicate that the plaintiff was interested in any way in the contract upon which it brought suit.

(E) The decisions of the Supreme Court of a state construing its practice acts are binding on the Federal courts.

On such a question of practice as is presented here, the Federal Courts will follow the decisions of the Supreme Court of the state where the suit is brought. (*Atlantic & P. R. Co.* v. *Hopkins*, 94 U. S. 11.) *Elmendorf* v. *Taylor*, 10 Wheat. 153, 158; *Memphis St. Railway* v. *Moore*, 243 U. S. 299; *Old Colony Trust Co.* v. *Omaha*, 230 U. S. 100, 116; *Chicago* v. *Obermayer Co.*, 268 Fed. 237; *Nederland Life Ins. Co., Ltd.*, v. *Hall*, 84 Fed. 278, C. C. A. (7th Cir.).

In the first case cited (94 U. S. 11) the Court said:

> "As the practice in the courts of the United States must conform as near as may be to that in the courts of the state (R. S. Section 914), these decisions construing the practice acts of the state are binding upon the courts of the United States."

In *Great Southern Life Ins. Co.* v. *Burwell*, 12 F. (2d) 24 (C. C. A., 5th Cir.), certiorari denied by this Court, 271 U. S., 689, 46 S. Ct. 633, 70 L. Ed. 1150, it appeared that the Mississippi Code provided that all life insurance companies doing business in the state should deliver to the insured with the policy a copy of his application, and that in default thereof the company should not be permitted in any court of the state to deny that any of the statements in the application were true. It was held that that provision, as construed by the Supreme Court of the state, is a rule of substantive law, inhering in the contract, and not merely a rule of evi-

dence, and as such, applies to actions in the Federal courts within the state.

In the case at bar, whether considered as a question of practice or as a rule of substantive law, Section 18 of the Illinois Practice Act is such a part of the contract between the partnership and the defendants in error that the corporation succeeding the partnership cannot sue upon the contract to which it has never been a party without complying with that requirement of the Practice Act.

In *Jones* v. *Prairie Oil & Gas Co.*, 273 U. S. 195, (Jan. 24, 1927), the Court said, by Mr. Justice Holmes:

> "* * * no case yet has gone to the length of undertaking to correct the construction of state laws by state courts. The exclusive authority to enact those laws carried with it final authority to say what they mean. The construction of those laws by the Supreme Court of the state is as much the act of the state, as the enactment of them by the legislature. If we thought the decisions cited far more questionable than we do, we nevertheless should bow to them as binding upon a matter of local administration and of only local concern."

III.

(A) Contract sued on was not assignable.

We shall not argue the question whether the contract itself was assignable, because we concede that the claim for damages which had accrued during the period that the contract was in force between the original parties, was assignable; or, in other words, the *executed* part of the contract was assignable. This is all that was sought to be recovered under the amended counts. The contract as far as it was *unexecuted*, we contend, was not assignable, because it had in it the personal trust and credit feature, and also because the quantity of oil specified was the requirements of N. & G. Taylor Co., the co-partnership, and not the requirements

of some corporation which might later be organized to take over the business of the co-partnership. We do not think this question is in the case, but the following authorities support our position:

Arkansas Valley Smelting Co. v. *Belden Mining Co.*, 127 U. S. 379.

Demarest v. *Dunton Lumber Co.*, 161 Fed. 264.

Thomas-Bonner Co. v. *Hooven, Owens & Rentschler Co.*, 284 Fed. 386, (C. C. A.); same case, 284 Fed. 377 (Dis. Ct.).

Delaware Co. v. *Diebold Co.*, 133 U. S. 473.

Burck v. *Taylor*, 152 U. S. 634.

(B) The executed and assignable part of the contract.

As far as the *executed* part of the contract is concerned, we contend that the defendants lived up to their obligations and shipped all the oil which they agreed to ship under the conditions which existed. The evidence showed not only that they used every effort to get tank cars in which to ship the oil, but that they succeeded to an extent sufficient to supply the requirements of N. & G. Taylor Co. during the period from November 21, 1916, to February 1, 1917, when that co-partnership went out of business.

CONCLUSION.

The plaintiff in error has much to say about technicalities of common law pleading in Illinois and the danger of a return to the days of Lord Coke. The fact of the matter is that leave to file the amended declaration was properly granted by the District Court and that leave to file the same amendment would have been properly granted under the very liberal Illinois Statute on Amendments which provides:

> "That the court in which an action is pending shall have power to permit amendments in any process, pleading or proceeding in such action, either in form or sub-

stance, for the furtherance of justice on such terms as shall be just, at any time before judgment rendered therein."

Cahill's Illinois Revised Statutes, 1927, (in force July 1, 1874), Chapt. 7, Sec. 1, p. 94.

The Statute of Limitations would not be a good defense, either in the Federal courts or Illinois courts, had the amendment been filed in apt time.

Something is said about the injustice of sustaining the plea of the Statute of Limitations, when the defendant knows all about the nature of the claim upon which he is sued. We might observe that the same situation would be presented if a defendant were sued upon a note made by him but barred by the Statute of Limitations. The fact that he would know all about the matter has never been supposed to prevent the successful pleading of the statute as a bar. Suppose the defendants in error in the case at bar had been fully advised by the plaintiff in error as to the nature of its demand and that it had in good faith acquired the chose in action from the partnership, but did not bring suit upon its claim until the statute had run. Can it be supposed that the defendants' knowledge would excuse the failure of the plaintiffs in error to set up its claim in the manner prescribed by law?

But we do not consider it necessary to defend the policy of the Statute of Limitations. As this Court has recently said:

> "The defense of the Statute of Limitations is not a technical defense, but substantial and meritorious. The great weight of modern authority is to this effect." *United States* v. *Oregon Lumber Co.*, 260 U. S. 290, 299.

It is respectfully submitted that the judgment of the Circuit Court of Appeals affirming the judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

Hobart P. Young,

Attorney for Defendants in Error.